

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

MASSACHUSETTS EYE & EAR  
INFIRMARY

Plaintiff,

v.

EUGENE B. CASEY FOUNDATION  
and THOMAS F. REILLY, as he is the  
Attorney General of The  
Commonwealth of Massachusetts,

Defendants.

Case No. 1:05-cv-11229-NMG

**REPLY OF PLAINTIFF MASSACHUSETTS EYE & EAR INFIRMARY  
TO DEFENDANT'S COUNTERCLAIMS**

The plaintiff Massachusetts Eye & Ear Infirmary ("MEEI") responds as follows to the Counterclaims of the defendant Eugene B. Casey Foundation ("the Foundation"). Allegations in the Counterclaims not expressly admitted herein are denied.

1. Responding to paragraph 1 of the Counterclaims MEEI admits that on or about November 27, 2002 it entered into a Contract with the Foundation, a true and accurate copy of which is attached to MEEI's Complaint herein marked Exhibit 1. Pursuant to that Contract, the Foundation agreed to provide \$2 million in funding for MEEI's Voice Restoration Research Program. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 1 of the Counterclaims.

2. Responding to paragraph 2 of the Counterclaims, MEEI admits that as of November, 2002 and through June, 2004, Dr. Steven Zeitels, who may be viewed by some as a "leading laryngologist", served as Director of Laryngology at MEEI. Responding further, MEEI

admits that effective July 1, 2004 Dr. Zeitels resigned from the full-time staff of MEEI, and that Dr. Zeitels has subsequently applied for and received renewal of his clinical privileges at MEEI such that he may continue clinical practice at MEEI. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 2 of the Counterclaims.

3. MEEI denies the allegations contained at paragraph 3 of the Counterclaims.

4. MEEI denies the allegations contained at paragraph 4 of the Counterclaims.

5. Paragraph 5 of the Counterclaims states a conclusion of law as to which no response is required.

6. Paragraph 6 of the Counterclaims states a conclusion of law as to which no response is required.

7. MEEI admits the allegations contained at paragraph 7 of the Counterclaims.

8. Responding to paragraph 8 of the Counterclaims, MEEI admits that it is a Massachusetts non-profit charitable institution including a medical facility located at 243 Charles Street, Boston, Massachusetts 02114.

9. Upon information and belief, MEEI admits the allegations contained at paragraph 9 of the Counterclaims.

10. Upon information and belief, MEEI admits the allegations contained at paragraph 10 of the Counterclaims.

11. MEEI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained at paragraph 11 of the Counterclaims.

12. MEEI denies the allegations contained at paragraph 12 of the Counterclaims.

13. MEEI denies the allegations contained at paragraph 13 of the Counterclaims.

14. Paragraph 14 of the Counterclaims states a conclusion of law as to which no response is required.

15. Responding to paragraph 15 of the Counterclaims, MEEI admits that in November 2002 Dr. Zeitels as its Director of Laryngology had certain duties in connection with the direction and administration of a Voice Restoration Research Program which MEEI had established and supported over a period of years. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 15 of the Counterclaims.

16. Responding to paragraph 16 of the Counterclaims, MEEI admits that its Voice Restoration Research Program included research and development of treatments for vocal-fold scarring, a condition effecting numerous individuals including children who may have sustained vocal-fold injuries as children, cancer patients with disease around the larynx, professionals who make extensive use of their voices, and aging individuals with voice deterioration. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 16 of the Counterclaims.

17. Responding to paragraph 17 of the Counterclaims, MEEI admits that an aspect of its Voice Restoration Research Program, which Program was created and supported by MEEI, included work coordinated by Dr. Zeitels and involving collaboration with doctors and researchers at other medical facilities engaging in a coordinated effort to advance the understanding and treatment of vocal-fold scarring and injuries. Responding further, MEEI states that Dr. Zeitels' role in coordinating certain work was not unique, that similar programs focused on the same research problem presently are conducted at other facilities, and that other individuals were and are capable of providing the same coordination which Dr. Zeitels provided

during his time as MEEI's Director of Laryngology. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 17 of the Counterclaims.

18. MEEI denies the allegations contained at paragraph 18 of the Counterclaims.

19. Responding to paragraph 19 of the Counterclaims, MEEI admits that certain but not all of the persons who worked on its Voice Restoration Research Program during the period prior to Dr. Zeitels resignation as a full-time staff member no longer are employed full-time at MEEI. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 19 of the Counterclaims.

20. MEEI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained at paragraph 20 of the Counterclaims.

21. Responding to paragraph 21 of the Counterclaims, MEEI is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding a letter referred to therein but not attached as an Exhibit to the Counterclaims.

22. Responding to paragraph 22 of the Counterclaims, MEEI is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding a letter referred to therein but not attached as an Exhibit to the Counterclaims.

23. Responding to paragraph 23 of the Counterclaims, MEEI admits that on or about November 27, 2002 the Foundation entered into a Contract with MEEI, a true and accurate copy of which Contract is attached to MEEI's Complaint herein marked Exhibit 1. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 23 of the Counterclaims.

24. Responding to paragraph 24 of the Counterclaims, MEEI states that the November 27, 2002 Contract, a copy of which is attached to its Complaint herein marked

Exhibit 1, speaks for itself and that no further response to the characterization of said Contract contained at paragraph 24 of the Counterclaims is required. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 24 of the Counterclaims.

25. Responding to paragraph 25 of the Counterclaims, MEEI admits that on or about December 2, 2002 the Foundation submitted a check to it in the amount of \$500,000, pursuant to the requirements of the Contract. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 25 of the Counterclaims.

26. Responding to paragraph 26 of the Counterclaims, MEEI states that the Contract attached to its Complaint herein marked Exhibit 1 speaks for itself, and that no further response to the characterization of that document contained at paragraph 26 of the Counterclaims is required. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 26 of the Counterclaims.

27. Responding to paragraph 27 of the Counterclaims, MEEI admits that it signed the Contract a copy of which is attached to its Complaint herein as Exhibit 1 and returned a fully executed copy to the Foundation. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 27 of the Counterclaims.

28. Responding to paragraph 28 of the Counterclaims, MEEI admits that it returned a fully signed copy of the Contract to the Foundation with a letter dated December 2, 2002. Responding further, MEEI states that said letter speaks for itself and that no further response to the characterization of that letter contained at paragraph 28 of the Counterclaims is required. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 28 of the Counterclaims.

29. MEEI denies the allegations contained at paragraph 29 of the Counterclaims.



30. Responding to paragraph 30 of the Counterclaims, MEEI states that any memo dated December 27, 2002 referred to therein, but which was not attached to the Counterclaims as an exhibit, speaks for itself and that no further response to the selective characterization of such a memo contained at paragraph 30 of the Counterclaims is required. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 30 of the Counterclaims.

31. MEEI admits the allegations contained at paragraph 31 of the Counterclaims.

32. Responding to paragraph 32 of the Counterclaims, MEEI states that the Contract pursuant to which the payments were made, which Contract is attached as Exhibit 1 to its Complaint herein, speaks for itself and that no further response to paragraph 32 of the Counterclaims is required. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 32 of the Counterclaims.

33. Responding to paragraph 33 of the Counterclaims, MEEI states that the Contract pursuant to which the payments were made, which Contract is attached as Exhibit 1 to its Complaint herein, speaks for itself and that no further response to paragraph 33 of the Counterclaims is required. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 33 of the Counterclaims.

34. Responding to paragraph 34 of the Counterclaims, MEEI admits that effective June 30, 2004 Dr. Zeitels resigned from the full-time staff of MEEI, and that Dr. Zeitels has since maintained and renewed his clinical privileges at MEEI through which he may continue to conduct clinical practice at MEEI. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 34 of the Counterclaims.

35. MEEI denies the allegations contained at paragraph 35 of the Counterclaims.

36. MEEI denies the allegations contained at paragraph 36 of the Counterclaims.

37. MEEI denies the allegations contained at paragraph 37 of the Counterclaims.

38. Responding to paragraph 38 of the Counterclaims, MEEI is without knowledge or information sufficient to identify what successes are referred to therein. Responding further, MEEI states that, with the funding which the Foundation agreed in the Contract to deliver, its Voice Restoration Research Program can approximate and exceed any activities or successes which could be achieved by an Institute of Laryngology and Voice Restoration. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 38 of the Counterclaims.

39. Responding to paragraph 39 of the Counterclaims, MEEI states that Dr. Ramon Franco who was acknowledged by Dr. Zeitels as an important collaborator in its Voice Restoration Research Program presently is serving as Acting Director of Laryngology while a search is conducted to identify and recruit a permanent Director of Laryngology and Merriam Professor of Otology and Laryngology. Responding further, MEEI states that Dr. Franco and any permanent Director of Laryngology which it may appoint can do work comparable to that performed by Dr. Zeitels in connection with MEEI's Voice Restoration Research Program. Except as hereinabove stated, MEEI denies the allegations contained at paragraph 39 of the Counterclaims.

40. MEEI denies the allegations contained at paragraph 40 of the Counterclaims.

41. Responding to paragraph 41 of the Counterclaims, MEEI upon information and belief denies that the ILVR can conduct a voice restoration research program consistent with the meaning of the Contract which is Exhibit 1 to the Complaint filed herein. Except as hereinabove stated, MEEI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained at paragraph 41 of the Counterclaims.

42. Responding to paragraph 42 of the Counterclaims, MEEI admits that by letter dated June 8, 2004, a copy of which is attached to the Complaint herein marked Exhibit 3, the Foundation requested that certain funds be wired to its account. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 42 of the Counterclaims.

43. Responding to paragraph 43 of the Counterclaims, MEEI states that it has no legal obligation to return any money to the Foundation, and admits that it has declined to do so.

44. Responding to paragraph 44 of the Counterclaims, MEEI denies that the Foundation has any right to an accounting under the terms of the Contract a copy of which is attached to the Complaint as Exhibit 1, is without knowledge as to the extent of any information regarding expenditures which may have been supplied to the Foundation by persons no longer on the full-time staff of or employed by MEEI, and admits that it has not provided an “accounting” since receiving the Foundation’s letter dated June 8, 2004.

45. Responding to paragraph 45 of the Counterclaims, MEEI denies that the Foundation has any right to an accounting under the terms of the Contract a copy of which is attached to the Complaint herein as Exhibit 1, is without knowledge as to the extent of any information regarding expenditures which may have been supplied to the Foundation by persons no longer on the full-time staff of or employed by MEEI, and admits that it has not provided an “accounting” since receiving the Foundation’s letter dated June 8, 2004.

46. MEEI denies the allegations contained at paragraph 46 of the Counterclaims.

47. MEEI denies the allegations contained at paragraph 47 of the Counterclaims.

#### COUNT I

48. MEEI repeats paragraphs 1 through 47 of this Reply as if set forth fully herein.



49. Paragraph 49 of the Counterclaims states a conclusion of law to which no response is required.

50. Responding to paragraph 50 of the Counterclaims, MEEI states that the Contract pursuant to which the payments were made, which Contract is attached as Exhibit 1 to its Complaint herein, speaks for itself and that no further response to paragraph 50 of the Counterclaims is required. Except as hereinabove stated, MEEI denies the allegations contained at paragraph 50 of the Counterclaims.

51. MEEI denies the allegations contained at paragraph 51 of the Counterclaims.

52. MEEI denies the allegations contained at paragraph 52 of the Counterclaims.

53. MEEI denies the allegations contained at paragraph 53 of the Counterclaims.

54. MEEI admits that it has declined to return money properly delivered to it under the Contract. Except as hereinabove admitted, MEEI denies the allegations contained at paragraph 54 of the Counterclaims.

55. MEEI denies the allegations contained at paragraph 55 of the Counterclaims.

## COUNT II

56. MEEI repeats paragraphs 1 through 47 of this Reply as if set forth fully herein.

57. Responding to paragraph 57 of the Counterclaims, MEEI denies that the Foundation has any right to an accounting under the terms of the Contract a copy of which is attached to the Complaint herein as Exhibit 1, is without knowledge as to the extent of any information regarding expenditures which may have been supplied to the Foundation by persons no longer on the full-time staff of or employed by MEEI, and admits that it has not provided an "accounting" since receiving the Foundation's letter dated June 8, 2004.

58. MEEI denies the allegations contained at paragraph 58 of the Counterclaims.

59. MEEI denies the allegations contained at paragraph 59 of the Counterclaims.

COUNT III

60. MEEI repeats paragraphs 1 through 47 of this Reply as if set forth fully herein.

61. MEEI denies the allegations contained at paragraph 61 of the Counterclaims.

COUNT IV

62. MEEI repeats paragraphs 1 through 47 of this Reply as if set forth fully herein.

63. MEEI denies the allegations contained at paragraph 63 of the Counterclaims.

64. MEEI denies the allegations contained at paragraph 64 of the Counterclaims.

65. MEEI denies the allegations contained at paragraph 65 of the Counterclaims.

66. MEEI denies the allegations contained at paragraph 66 of the Counterclaims.

FIRST AFFIRMATIVE DEFENSE

The Counterclaims fail to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The Counterclaims are barred by reason of the Foundation's unclean hands.

THIRD AFFIRMATIVE DEFENSE

The Counterclaims are barred by the doctrines of estoppel and waiver.

FOURTH AFFIRMATIVE DEFENSE

The Counterclaims are barred under the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

The Foundation has failed to plead its Counterclaims with the requisite particularity.

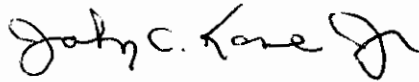
SIXTH AFFIRMATIVE DEFENSE

The Foundation lacks standing to prosecute the Counterclaims.

WHEREFORE, MEEI respectfully prays:

1. That the Counterclaims and each Count thereof be dismissed as to it with prejudice;
2. That it be awarded its costs of this action, including a reasonable attorneys' fee; and
3. For such other and further relief as to this Court may appear just and appropriate.

MASSACHUSETTS EYE & EAR INFIRMARY  
By its attorneys,



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Dated: July 8, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail, ~~hand~~.

Date: 7/8/05 